



Excise Tax Advisory

Excise Tax Advisories (ETA) are interpretive statements issued by the Department of Revenue under authority of RCW 34.05.230. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of facts. They are advisory for taxpayers; however, the Department is bound by these advisories until superseded by Court action, Legislative action, rule adoption, or an amendment to or cancellation of the ETA.

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A STATEMENT OF PURPOSE AND INTENT WITH RESPECT TO ISSUES INVOLVING EMPLOYEE PLACEMENT BUSINESSES AND THEIR CLIENTS

Issued April 26, 1990

This memorandum announces a change in the department's position on the taxability of businesses which recruit and procure employees to do work for other businesses. Formerly, the department has looked to the terms of the contracts between the respective businesses to determine if the workers were employees of the procuring company or employees of the company for whom the work is performed.

In *RHO Company, Inc. v. Department of Revenue*, 113 Wn 2d 561 (1989), the Washington Supreme Court ruled that the determination of which company is to be regarded as the employer of the workers for taxation purposes will depend upon the degree of control which the business to whom the workers are supplied exercises over such persons. If the control by such business is so pervasive as to render the business supplying the workers little more than a paymaster, then the business to which the workers are provided will be regarded as their employer. The terms of any written contract between the businesses will still be a factor, but will not alone be the determining factor in establishing the relationship between the parties. Such contract designations are to be weighed with all other factors in any case. Thus, for all periods after November 1, 1989, the department and taxpayers must examine the elements of control over the workers and the work performed in order to decide whether the business which procures the workers is a) their employer (thus taxable upon gross receipts from the business to whom the workers are provided) or b) only a worker procurement and placement business acting solely as a payrolling agent (thus taxable upon only the charges for finding, processing and payrolling employees).

In the latter case, mere payrolling agents may deduct employee salaries and benefits paid to them by their client businesses and passed through to the workers. The payrolling agent is entitled to the deduction for advances and reimbursements with respect to the passed through amounts. (WAC 458-20-111).

ETBS have been made Excise Tax Advisories, and have retained their old number. Advisories with a 2 (plus three digits) are new advisories, ETBs that have been revised and readopted after review under the Department's regulatory improvement program, or advisories that have been revised and/or readopted.

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STATEMENT OF POLICY

The following elements or factors will be considered by taxpayers and the department to determine who has pervasive control:

1. Ultimate decision as to hiring and firing the worker;
2. Ultimate decision as to duration of employment;
3. Setting the rate, amount, and other aspects of compensation;
4. Determining the worker's job assignments and instructions;
5. Exercising exclusive guidance and supervision over the work performed;
6. Evaluating the worker's performance;
7. Determining the days and hours of work performed;
8. Providing the office space or other controlled work premises;
9. Providing the tools and materials applied in the workplace;
10. Compensating workers for vacation time, sick leave, and insurance benefits;

When these elements of control exist only in behalf of the business to whom the workers are provided, that business will be treated as the employer and the business providing the workers will be treated only as a payrolling agent, notwithstanding terms in any contract between the businesses.

When one or more of these elements exist in behalf of the business providing the workers, and any contract between the parties designates this business as the "employer," then it will be treated as the employer for state tax purposes as well.

When there is no written contract between the businesses, the elements of control, to the extent that they are determinable, must exist exclusively in the business to whom the workers are provided such that the business providing the workers is acting solely as an agent in procuring and paying the workers.

PROCEDURES

Effective November 1, 1989, businesses providing workers to others and who are found to be acting only as payrolling agents shall report gross receipts under the classification Service and Other Business Activities (RCW 82.04.290) and may deduct the amounts of employee payroll and benefits, including per diem and travel expenses (WAC 458.20.111).

Businesses found to be providing their own employees to generally perform the work of others shall report gross receipts under the Service and Other Business Activities classification with no deductions for amounts of any employee payroll or benefits.

Businesses which are licensed or otherwise hold themselves out as providing specialized workers to perform business activities for others which are specifically tax classified in Chapter 82.04 RCW shall report gross receipts according to the appropriate section of law, i.e., according to the nature of the business performed.

Such businesses shall collect and report retail sales tax when appropriate; e.g., construction prime contractors, plumbing contractors, paint contractors, etc.

RETROACTIVITY

Businesses engaged only as agents to provide workers for others during periods before November 1, 1989 and which have not registered and paid tax on gross receipts may report tax upon gross receipts under the statutory tax classification applicable for the nature of the work performed by the workers provided and may deduct any amounts received for employee payroll and benefits. All such businesses must be registered with the department. If questions persist concerning the tax status of the recruiting paymaster, the department will assist such businesses in determining and resolving past tax liabilities on request.

